THE GENERAL WELFARE.

THE words, 'the general welfare' are used twice in the Constitution of the United States. The preamble to the Constitution is as follows:

"We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Article I, section 8, is as follows: "The Congress shall have power,—

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money," etc., followed by fifteen other specific grants of power.

From the beginning of the Government two schools have developed from the construction of these words, with Alexander Hamilton the leader of one, and James Madison of the other.

Mr. Hamilton's well-known imperialistic views were clearly shown and developed in the Constitution-making era, and how far he would have gone had he been left to his own discretion in forming an imperial Government for the people of the United States, of course, is a subject of mere conjecture. On the question of the power of Congress to legislate, it is known that he brought to the Convention the draft of a constitution, in which he proposed that Congress should have "power to pass all laws whatsoever, subject to the negation hereafter mentioned. And moreover that the President should have power to negative all laws passed in the State by a Governor, which Governor was to be appointed by the general government."

This was very similar to a proposition of Mr. Randolph's in

the Convention, "that the National Legislature ought to possess the legislative rights vested in Congress by the Confederation; and moreover *to legislate in all cases for the general interest of the Union,* and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." [1] This was quite similar to Mr. Hamilton's proposition, and quite different from what was finally adopted in the enumeration of powers as set forth in Article I, section 8.

Mr. Hamilton having failed to secure to Congress the power to legislate in all matters which Congress might deem of benefit or interest to the United States, has sought to attain the same end by giving to the words, 'common defence and general welfare' that broad significance which would embrace the powers denied by the Convention in its rejection of his plan and the similar plan of Mr. Randolph. This is made more striking by the fact that in the earlier proceedings of the Convention a resolution was actually adopted giving to Congress the power "to legislate in all cases for the *general interest of the Union*", etc.[2] Mr. Hamilton's attempt to construe these words as giving the same power as the power to legislate for the general interest of the Union is shown from his Report on Manufactures in 1791: He says,

> "The terms 'general welfare' were doubtless intended to signify more than was expressed or imported in those which preceded; otherwise numerous exigencies, incident to the affairs of the nation, would have been left without a provision. The phrase is as comprehensive as any that could have been used, because it was not fit that the constitutional authority of the Union to appropriate its revenues should have been restricted *within narrower* limits than the *general welfare,* and because this necessarily embraces a vast variety of particulars which are susceptible neither of specification nor of definition. It is therefore of necessity left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems no rea-

[1] MADISON PAPERS, 1220.

[2] JOURNAL OF CONVENTION, 181, 182, 208.

son for doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, *so far as regards an application of money.* The only qualification of the generality of the phrase in question which seems to be admissible is this: that the object to which an appropriation of money is to be made must be *general* and not *local,*—its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot. No objection ought to arise from this construction from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the general welfare. A power to appropriate money with this latitude, which is granted in express terms, would not carry a power to do any other thing not authorized in the Constitution, either expressly or by fair implication."

Mr. Hamilton, thwarted in his attempt to give unlimited legislative powers to Congress in the Convention, seeks in the above statement to secure the same result by his construction of the words, 'general welfare' in Article I, section 8 of the Constitution.

Now the opposing school, as represented by Mr. Madison, relies upon a report of his in 1798-1799, and his message vetoing the bill for internal improvements on the 3rd of March, 1817, in which he uses the following language:

"To refer the power in question to the clause 'to provide for the common defense and general welfare' would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers, which follow the clause, nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power of legislation, instead of the defined and limited one, hitherto understood to belong to them, the terms 'the common defense and general welfare', embracing every object and act *within the purview of a legislative trust.* It would have the effect of subjecting both the Constitution and the laws of the several States, in all cases not specifically exempted, to be superseded by laws of Congress, it being expressly declared 'that the Constitution of the United States, and the laws made in pursuance thereof, shall be the supreme law of the land, and the judges of every State shall be bound thereby,

> anything in the Constitution or laws of any State to the contrary notwithstanding'. Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participating in guarding the boundary between the legislative powers of the General and the State governments, inasmuch as questions relating to the general welfare, being questions of *policy* and expediency, are unsusceptible of judicial cognizance and decision. A restriction of the power 'to provide for the common defense and general welfare' to cases which are to be provided for by the expenditure of money would still leave within the legislative power of Congress all the great and most important measures of government, money being the ordinary and necessary means of carrying them into execution."

Thus, the issue is squarely made. We shall seek to secure the truth from the views of these two able contestants. The words are first found in the preamble to the Constitution. In that place they do not constitute any substantive grant of power. A preamble merely sets forth the purposes of a Constitution or an Act. It is the porch to the building through which you enter the building, its architecture determines that of the building. Judge Story says: "Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them * * *[3] Chief Justice Fuller in *Railroad Company* v. *Thomas*,[4] says, "the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act unless they are doubtful or ambiguous." Justice Harlan, in *Jacobson* v. *Massachusetts*,[5] says, "although the preamble of the Constitution indicates the general purposes for which the people ordain and establish the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States, or on any of its departments * * * although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power

[3] STORY ON THE CONSTITUTION, Volume I, section 462.
[4] 132 U. S. 188.
[5] 197 U. S. 22.

can be exerted to that end by the United States, unless apart from the preamble, it be found in some expressed delegation of power, or in some power to be properly implied therefrom." Their presence, therefore, in the preamble to the Constitution can shed no light on the question under discussion. We turn, therefore, to Article I, section 8, the only other place in the Constitution where the words are used. The language is as follows:

> "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States;"

Judge Story and his followers all hold that Article I, section 8, above quoted, wherein these words are used, from their location in the sentence, and from the punctuation of the paragraph, preclude the idea that the words 'the common defense and general welfare of the United States' constitute a substantive grant of power, but that they are merely qualifications of the words 'to lay and collect taxes', etc. That the words 'to lay and collect taxes', etc., by themselves admit of no limitation as to the property that may be reached, and the limit of taxation on such property of the citizens of the United States, for revenue, but that the words 'general welfare' describe the specific purposes for which such taxes may be used; that these words in no wise grant to Congress the power to legislate for 'the general welfare' of the United States, for they do not constitute a substantive grant of power for these purposes, but that when Congress uses its power to lay taxes and collect them it is limited in the distribution of such taxes to that which concerns the 'common defense and general welfare' and to these alone. Hamilton, Story and Madison, and all parties of both schools, practically concur in this view. The point of cleavage is what constitutes the 'general welfare'. Hamilton and Story hold the term is unlimited save by the discretion of Congress, while Madison and his followers would limit these words by the seventeen specific grants of power to Congress in this section 8, Article I of the Constitution; for, if not, why enumerate them, when each clearly is embraced in the term 'general welfare' of the whole people.

But Judge Story, as the leader of the Hamiltonian School, attempts to avoid the force of this construction by holding that while Congress has no power under these words in Article I, section 8, to initiate legislation for the 'common defense' or 'general welfare of the United States', since he holds that these words do not give a substantive grant of power, yet that Congress may appropriate money for the 'common defense and general welfare'. As for example, Congress without power to pass an act to regulate education or establish a school system in the United States as a part of the 'general welfare of the United States', may by law appropriate money to such schools which it is prohibited from establishing. Or, that Congress without power to reguiate labor in the United States, except such as is engaged in interstate commerce, or the Government service, may appropriate money to labor Unions because the position and condition of labor in the country pertains to the 'general welfare' of the whole country. He holds that Congress cannot create a system which would be embraced in the 'general welfare of the United States', but leaving this to other governments that have the power so to do it may, by appropriation, aid and support what it is denied the right to create.

Mr. Madison and his school have held that these words in the first paragraph of Article I, section 8, are merely descriptive of and limited by what follows in the seventeen grants of power in the same section and separated from each other by a semi-colon only.

That Congress has the power to appropriate money for a purpose not granted in the Constitution, I think has never been decided by the Supreme Court of the United States. Judge Charles E. Hughes, in a recent case,[6] decided but not reported, has boldly advanced this view, and asked the Court to decide the case on that ground. They decided the case in his favor, but on other grounds,[7] I am told.

Supporting Mr. Madison's view, Mr. Jefferson in his opin-

[6] Chas. E. Smith *v.* Kansas City Title and Trust Co.

[7] See also U. S. *v.* Realty Co., 163 U. S., 440; U. S. *v.* Gettysburg Electric Railway Co., 160 U. S., 681; Allen *v.* Smith, 173 U. S. 402.

ion on the power of Congress to establish the Bank of the United States, February 15, 1791 says:

> "To lay taxes to provide for the general welfare of the United States, that is to say, 'to lay taxes *for the purpose* of providing for the general welfare'. For the laying of taxes is the *power,* and the general welfare the *purpose,* for which the power is to be exercised. Congress are not to lay taxes *ad libitum,* for any purpose they please; but only *to pay the debts, or provide for the welfare of the Union.* In like manner they are not *to do anything they please,* to provide for the general welfare, but only *to lay taxes* for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would also be a power to do whatever evil they pleased. It is an established rule of construction, where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which will render all the others useless. Certainly, no such universal power was meant to be given them. It was intended to lace them up strictly within the enumerated powers, and those without which, as means, these powers could not be carried into effect. It is known that the very power now proposd *as a means,* was rejected *as an end* by the Convention which formed the Constitution."

Judge Marshall has been cited as sustaining Hamilton's view, but this can hardly be claimed in view of the language of the Chief Justice in Gibbons *v.* Ogden.[8] In a sentence he quotes the first part of Section 8, Article I, where Congress is authorized 'to lay and collect taxes, provide for the general welfare', etc., showing that that very question is in his mind, and in the same sentence uses this language: "Congress is not empowered to tax for those purposes which are within the exclusive province of the States". The inference from which is strong, be-

[8] 9 Wheat. 199.

cause such objects are not a part of the 'general welfare of the United States'.

If Congress cannot tax for State purposes, that is, for those things which are under State control, clearly it cannot *appropriate* money to a purpose that it is prohibited from levying a tax for; and in *McCullough* v. *Maryland,*[9] Judge Marshall lays down that wonderful test, 'let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional'. The end, the purpose, the object must be legitimate, and must be within the scope of the Constitution. But in his opinion in this same great case he adds: "should Congress in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, *pass laws for the accomplishment of objects not entrusted to the Government,* it would be the painful duty of this tribunal should such a case come before it, to say that such an act was not the law of the land". Judge Cooley may be cited as endorsing this view in his "Constitutional Limitations":[10] "The general purpose of the Constitution of the United States is declared by its founders to be, 'to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity'." This is the preamble to the Constitution embracing a general statement of the general objects and purposes of the Constitution. Judge Cooley then adds: *"To accomplish these purposes,* the Congress is empowered by the eighth section of article one:

1. To lay and collect taxes," etc., enumerating in full the seventeen grants of power in that section. What purpose? The purposes set forth in the preamble, one of which is 'the general welfare'; and how is that to be accomplished? Judge Cooley answers, "the Congress is empowered by the eighth section of article one" to secure the general welfare of the United States by exercising the powers therein enumerated.

[9] 4 Wheat. 316, 405, 421.
[10] Seventh Edition, page 11.

Willoughby, who has published one of the latest and one of the ablest commentaries on the Constitution, says:

> "Especially by those who desire to magnify the powers of the Federal Government it has been argued that instead of construing Section 8, of Article I as simply the grant of an authority to raise revenue in order to pay the debts and provide for the common defense and general welfare of the United States, it should be interpreted as conferring upon Congress two distinct powers; namely: (1) the power of taxation; and (2) the power to provide for the common defense and general welfare. And, under the latter of these two grants, it has been argued that the Congress has the authority to exercise any power that it may think necessary or expedient for advancing the common defense or the general welfare of the United States. It scarcely needs be said that this interpretation has not been accepted by the courts. Were this view to be accepted the government of the United States would at once cease to be one of the enumerated powers, for it would then be possible to justify the exercise of any authority whatsoever upon the ground that the general welfare would thereby be advanced."

So that we have arrayed on this question, on one side Hamilton and Story, and on the other side, Madison, Jefferson, Marshall, Cooley and Tucker, while the Supreme Court we believe has never passed upon this question. Mr. John Randolph Tucker has discussed this question probably more elaborately than any of the commentators, except Judge Story, and I shall quote from him quite freely. He says,[11]

> "The point of divergence is, that Madison holds the words 'common defense and general welfare' as a general description of the objects of the tax-power, limited by and commensurate with the objects of the Constitution as defined in the enumerated powers thereafter specified; and that there can be no 'common defense and general welfare' intended by the Constitution beyond what Congress has power to create, regulate and control by virtue of the enumerated grants. *E contra,* Hamilton holds that the words 'common defense and general welfare' include two classes of objects. First, those which are within the scope of the sub-

[11] TUCKER ON THE CONSTITUTION, Vol. I, page 477.

> sequently-enumerated grants of power; and second, all others that Congress may deem to be for the 'common defense and general welfare'."

Both contestants hold that Congress has only the enumerated powers, but Madison holds that Congress can only raise money to carry out the enumerated powers, while Hamilton holds that it may do so, not only for these, but for any others that it may *deem* for the 'common defense and general welfare'. Hamilton, therefore, as far as money is concerned, thinks the Constitution placed no limits on the objects of its appropriation, except the discretion of Congress as to what might be brought within the words 'common defense and general welfare'. And further on he adds:[12]

> "It would really seem absurd to impute to the framers of the Constitution a purpose to comprehend objects far beyond the powers it conferred upon the government. It is argued everywhere in the *Federalist* that power ought to be commensurate with purpose. But this construction, insisted on by Hamilton and his followers, would indicate that the Constitution contemplated the unlimited expenditure of money, to be raised by taxation under governmental power, to carry out objects which were not within the control given, or the powers committed to, Congress. Power and purpose were not commensurate, except that by this construction Congress had unlimited discretion to raise and expend money by taxation, to aid and accomplish purposes and objects that were beyond the power of Congress to effect: which involves the conclusion that the Constitution trusted Congress to spend money for objects which might be regulated and controlled by other governments, but would not trust Congress to create and regulate these objects of appropriation. In other words, Congress cannot make and control a railroad: but it may raise and appropriate money for the benefit of a corporation that is to regulate and control it. Such a construction of the Constitution is anomalous. It gives an unlimited power of raising money, to be expended at the discretion of Congress, upon any and all schemes which Congress might deem for the 'common defense and general welfare', although such schemes Congress is not empowered to project or to carry into execution by any power delegated to it.

[12] TUCKER ON CONSTITUTION, Vol. I, page 478.

"If, under the tenth amendment of the Constitution, a specific power to do a particular thing is not delegated to the United States by the Constitution, then it is reserved to the States. Such a thing is in no way within the control and direction of the United States. If it be within the words 'common defense and general welfare', still, as those words grant no power, Congress cannot exercise it. And yet, despite this, the construction contended for would give to Congress unlimited power to spend any amount of money to carry out a project or scheme clearly and only within the reserved powers of the States. Is it legitimate to give to the power of taxation, which is ordinarily but a means for effecting the purposes of power, the larger function of unlimited discretion in selecting objects not within the delegated power as the recipients of the benefactions of revenue? Is it legitimate thus indirectly to carry into effect an ungranted power—a power which, being ungranted and if not prohibited to the States, is reserved to them? Is not this a usurpation by indirection, through taxation, as flagrant as if it were a bald exercise of the ungranted power? Judge Story says that this construction is conformable to the proposition 'to legislate in all cases for the general interests of the Union'. But that proposition was never adopted, and was rejected. Is it legitimate, then, to conform the construction of the words 'to provide for the common defense and general welfare' to a purpose which was proposed and rejected? It is true that Mr. Hamilton, in his draft of a Constitution, proposed that Congress should have 'power to pass all laws whatsoever, subject to the negative hereafter mentioned', and that the President should have power to negative all laws passed in the State by a Governor or President, who shall be appointed by the general Government. Again, in Article VII of his scheme of a Constitution, he proposed that 'the Legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defense and general welfare of the Union'. But this proposition of Mr. Hamilton was displaced by the provision of the Constitution which clearly enumerated the powers delegated to Congress."

And further on page 480, Mr. Tucker says:

"If Congress can thus by appropriation exercise this power, it would indirectly exercise a power not granted, and since denied to it. If so, what use would there be for the tenth

amendment or for Article I, Section 1, of the Constitution? It is an anomaly to hold that any government can raise money except as a means to execute its own power.[13] Taxation is a great power; but in itself it does nothing except as it is a means for doing that which is within the powers to be carried out by a government. That a government should have this great means to execute the powers of other governments reaches the point of absurdity. Why should government be given the means to execute a power which is denied to it and confided to another? Why give it the power to help another to do what is denied to it? If Congress cannot be trusted with the grant of a power why give unlimited discretion to Congress to raise money to enable one not entrusted with the power by Congress to perform it? Can such folly be attributed to the framers of the Constitution? It is obvious that the mass of powers which Congress would thus exercise by means of its revenue powers are powers which are reserved to the States; for the powers not delegated to the United States, unless prohibited to the States, are reserved to them. Thus it would follow that the revenue to be expended by Congress under this construction would be expended for the execution of powers which were reserved to the States. The effect then would be, that while Congress is denied the particular power, it could effectually execute the power and invade the domain of State reservation by the expenditure of money; and conditioning the expenditure of money upon the substantial concession of power would, through money, virtually absorb the autonomy of the States and consolidate the whole governmental system into centralism."

Judge Marshall in *McCullough* v. *Maryland*,[14] powerfully supports this view in speaking of the power of a State to tax the agencies of the Federal Government—"The right never existed, *and the question whether it has been surrendered,* cannot arise." This sentence disposes of the argument so often advanced that by constant attrition a substantive power under the Constitution can be eliminated or that by constant usurpation and repetition of an illegal power it may be made valid and legal! And further he says, "that there is a plain repugnance in con-

[13] STORY ON THE CONSTITUTION, sec. 930.
[14] 4 Wheat. 430-431.

ferring on one government a power to control the Constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied". Could judicial confirmation of the above position be stronger? And it would seem to be not in accord with the conclusion of Professor Willoughby [15] who says: "The doctrine has become an established one that Congress may appropriate money in aid of matters which the Federal Government is not constitutionally able to administer and regulate". True it is that Congress does constantly appropriate money for unconstitutional purposes, but this has never been sanctioned by the Supreme Court and thereby become an established doctrine.

The 'general welfare' clause is that clause which is invoked when no specific or implied grant of power can be found in the Constitution for any measure. It is the *dernier resort* of those who find no grant or implied power for their measures in the Constitution. As we have shown, it is the attempted assertion of a power which the makers of the Constitution fully considered, and even at one time practically adopted, and then deliberately rejected in the making of the Constitution. The great mass of legislation which has broken through the Constitution in recent years under the protection of this specious claim of power, and the great mass which now fills the calendars of both branches of Congress, awaiting consideration under the same claim of power, will prove to be incisions into the constitutional wall that will finally let in an unlimited centralized control of the people's local rights in the city of Washington. President Washington has impressively stated his views on this subject: "If, in the opinion of the people, the distribution of the constitutional powers be in any particular wrong, let it be corrected in the way in which the Constitution designates. But let there be no change by usurpation, for this, *though it may in one instance be the instrument of good,* is the ordinary weapon by which free governments are destroyed."

Justice David Davis,[16] in speaking of the attempt to disre-

[15] WILLOUGHBY ON THE CONSTITUTION, sec. 269.

gard constitutional provisions during critical periods, says: "No doctrine involving more pernicious consequences was ever invented by the wit of man, than that any of its provisions can be suspended during any of the great exigencies of Governments. Such a doctrine leads directly to anarchy and despotism."

Henry St. George Tucker.

LEXINGTON, VIRGINIA.

[16] *Ex parte* Milligan, 4 Wall. 109.